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The „Collateral Estoppel" Theory in International Law

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Abstract: The objectives of the article are represented by the fact that the interdependence of the two legal orders, internal and international, refers to the fact that, international law without internal law signifies federalization, which the contrary situation signifies the impossibility of establishing an international community. The rules of international law are applied to national court according to national constitutions and for domestic purposed. According to the theory of the act of state, even if it would seem that, at least internal acts of implementation of international rules are subjected to internal jurisdictions, the resolutions implemented often touch the problem of security and public order that escapes the judicial competencies. But, sometimes, the refuse of controlling the resolutions of the SC has been justified according to the UN Charta supremacy. In this case, national courts have been in the position of interpreting the CS resolutions. In conclusion it results that international law will efficiency the application of positive law being at least, an instrument of interpreting, and, on the other side, national law represents an exclusive means of transposing international regulation on a state plan.

Keywords: collateral estoppels; reexamination; collateral effect; normative reinforcement

1. Introduction

The complexity of positive law is manifested through the autonomy and at the same time, through the interdependence of the two legal orders. Autonomy is represented by the fact that internal law established a suzerain manner to the place in which rules of international law occupy and, thus, this cannot represent an obstacle in its application. Unlike this aspect, international law cannot be invalidated by a norm of internal law, being capable of establishing the efficiency of rules of internal law on an international plan, even if, sometimes, it is difficult to realize a practice or a uniform jurisprudence.

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2. The ICJ Role of Stopping the Reexamination of Already Solved Problems

The invoking of ICJ decisions to stop the reexamination of problems already solved also called "*collateral estoppel*", the doctrine of the collateral effect, has in sight the American doctrine regarding the collateral effect of the power of the thing judged of judicial decisions, that is the stopping of the reexamining of things already solved by an anterior definitive decisions, even in a case with a different object. According to the decision of the USA Supreme Court in Cromwell v. County of Sac the difference between *res judicata* and *collateral estoppel* is that, in the first case, the effect of the definitive decisions between the parts, object and cause if full, while in the second case it bears a different trial which implies things already solved by the first trial by jury verdict[1]

This means, among other, that only de fund decisions may give birth to such a collateral effect. The principle of relativity of legal decisions excludes from application third parties which didn't participate in the trial. But, third parties value claims separately regarding the effects resulted from anterior decision, the exception "*collateral effect*" may be invoked. Thus, it has been sustained that ICJ decisions may be applied in order to stop in a future internal procedure the judging of problems already solved through its decisions.

On the other side, for this reason, different decisions are relevant that followed the ICJ jurisprudence in the case of American hostages in Teheran as Narenji v. Civiletti, National Airmotive v. Iran, US v. Central Corporation of Illinois[2] (Higgins, 1994). Also, the ICJ decision in the case of Anglo-Iranian oil society was taken by national judges in actions started by the society against a Swiss buyer and, later, against a Japanese society. The civil court in Rome has used similar conclusions in the case Anglo-Iranian Oil Company v. S.U.P.O.R in the trial from 3 September 1954.

[1]Cromwell v. County of Sac, 94 U.S. 351 (1876) U.S. Supreme Court Cromwell v. County of Sac, 94 U.S. 351 (1876) Cromwell v. County of Sac 94 U.S. 351 Error to the circuit Court of the United States for the district of Iowa Syllabus (http://supreme.justia.com/us/94/351/case.html.)

[2]Baroness Higgins, DBE, QC (b. in London, 1937) is the President of the International Court of Justice. Higgins was the first female judge to be appointed to the ICJ, and was elected President in 2006: ICJ condemned Iran that "was fully conscious by its obligations ... has had all necessary means to fulfill its obligations; (but) it failed to fulfill these obligations").

These examples prove that, on many occasions the internal judge tries to avoid the obstacles risen by the inter-state nature of ICJ decisions using the doctrine "*collateral estoppel*" by avoiding *res judicata*.

On the other side, the people opposing the "*collateral estoppel*" theory have sustained that the doctrine in this situation can be used in the favor of a third party and against one of the parties to the trial. In the national decisions mentioned are involved only private persons – natural or legal persons, which weren't parties to the trial judged by the ICJ because only states have the quality of subjects. But if the national decisions mentioned are not explained according to *„collateral estoppel*" then what is its legal foundation? Regarding the *Narenji* case (Higgins, 1994), it has been shown that the measures taken by the authorities against Iranian students have an internal character, being bind from the point of view of internal legal order in the virtue of the fact that the executive may realize discriminations on basis of nationality in certain circumstances. On an international plan, these measures cannot be seen but as retorts against Iran, a non-friendly behavior, but legal. In these circumstances, the invoking of the ICJ decisions wasn't more than an aid.

In order for the ICJ decisions to be efficient on an internal plan, the modification of the ICJ status may be imposed so that the decisions of the Court may be able to create rights and obligations that the private law persons may value. This point of view is desired and a meaningful antecedent is found in article 14 (1) of the ante-project on arbitrary procedure elaborated by the Commission of International Law in 1950. According to his article, arbitrary sentences enjoyed compulsory power "for all the state parties in litigations and for all retorts and organisms of these state". (Pigui, 2009)

The subjects of internal law have access to international jurisdictions after the exhaustion of all internal jurisdictional means of the state against which there is a complaint. At this moment, they can obtain diplomatic protection for their state or they can address international courts for the solving of the illegality. The contrary situation, when the illegal fact of a state was established by an international court as in the cases *La Grand* and *Avena*, has raised controversies if this is allowed to subjects of internal law to invoke in front of national jurisdictions the authority for the thing judged to demand compensations in repairing as a consequence of the illegality already established.

Regarding the guarantee of non-repeatability and its effects on an internal plan, we must mention the case *La Grand*[1] which upset the international law through the guarantee imposed to the United States at the Germany request by the International Court of Justice. Two German nationals have been executed by the United States without obeying the Vienna Convention to inform prisoners regarding the right to benefit from the assistance of their consulate. Germany demanded the ICJ to find that the USA is obliged to offer insurance and guarantee of non-repeatability of breaching the obligations imposed by the Vienna Convention regarding diplomatic protection and hasn't demanded any material reparation for the prejudice suffered. The Court offered satisfaction to Germany which obtained insurance for the non-repeatability demanded and in the case in which the USA will condemn the German nationals to severe punishment without respecting the consulate notice; it should be forced to internal measures that allow the reexamination and revision of the culpability verdict.

This decision has raised debates regarding the determination of the fact if the obligation of non-repeatability should be attached as a secondary obligation to a main obligation in the state responsibility, but, contrary to this, the ICJ has condemned USA in the virtue of the responsibility for the illegal fact of breaching the Vienna Convention, to a new obligation (besides the liability one) of not violating any other rule, which by definition, engaged to conformity. The obligation of non-repeatability is axed more on prevention than on equitable reparation. ICJ hasn't examined the judicial basis in order to establish an obligation of non-repeatability, but the Commission of International Law hasn't clarified this aspect[2]. (Beşteliu, 2/2006, pp. 4-5)

The case *La Grand*was the beginning of a jurisprudence of the Court by which obligations are imposed to state, more than the diligence ones[3]. Afterwards, in the *Avena* case, ICJ has followed the same lead of jurisprudence and condemned USA for breaching the obligation to inform 52 Mexican nationals, condemned to capital

[1]International Court of Justice, *La Grand Case* (Germany v. United States of America, International Court of Justice, 1999.

[2]It is shown that in art. 31, as it appears in the writings of the CDI 2001 Project, it leaves room for two interpretations: we can admit that there are illegal international facts that do not produce a quantifiable prejudice or a moral one, case in which the establishing of responsibility attracts the obligation of ceasing an illegal behavior and fulfilling correctly the obligation violated or that the prejudice is brought to judicial order in its ensemble (judicial and legal prejudice). The ICJ comments content only to making sending to the content of the primal obligation, without solving this aspect.

[3]Academie de Droit International de la Haye. (1996). *«Recueil Des Cours». Collected Courses.* Volume 207(1987-VII). Martinus Nijhoff Publishers, pp. 211-213.

punishment, regarding their rights to consulate assistance. The decision to condemn imposed the USA the obligation of reexamining the verdicts already pronounced in the virtue of the guarantee of non-repeatability established in *La GrandAvena* underlined in a retroactive manner, the reparative function of non-repeatability guarantee, considered before as being mainly preventive.

These examples prove that on many occasions the internal judge tries to avoid obstacles raised by an inter-state nature of ICJ decisions by using the "*collateral estoppel*" in order to avoid *res judicata.*

On different occasions, the ICJ decisions were taken into consideration for the purpose of interpreting rules of international law by national courts. In these cases, national law is seen as a "factory of international law" (Jennings, 1987, p. 10). Bendayan and Ettedgui, nationals of the United States living in Morocco have been called to justice in Casablanca which is under French jurisdiction, for the transporting of check, because they breached the dispositions regarding authorization and their declaring[1]. It is referred in art. 102 of the act from 7 April 1906 and the statement already in force regarding the nationals of the United States had already been confirmed by ICJ in the Rights of nationals of the United States of America in Morocco. Bendayan has provoked the jurisdiction of the court in Morocco because in art. 102 of the same act (Algesiras), the confiscation, the fine or penalties in customs material must be applied for strangers by a consulate jurisdiction. Thus, the problem posed was to establish if this disposition of the Algesiras act could be applied in this case and if French jurisdictions were competent in interpreting this act. On the latter problem, the Court remembered that competency belonged to judicial courts to interpret international convention and in this case, art. 102 were clear and had as object customs crimes. This, crimes against Morocco legislation realized in the exchange of two foreign citizens of American nationality did not enter in the provisions art. 102 of the Algesiras act. Thus the Cassation Court has rejected Bendayan's appeal. In the determination of the meaning of the Algesiras act the Court kept in mind the ICJ decision in the case Rights of nationals of the United States of America in Morocco. (Pigui, 2008)

Thus in the *Bendayan* case, the French Cassation Court used the ICJ decision in the case of Rights of nationals of the United States of America in Morocco, for the interpretation of international law (Jasentuliyana, 1995, p. 287). The accused, Central Corporation, affirmed that the two apartments cannot be considered

[1]http://www.icj-cij.org/homepage/index.php?lang fr.

headquarters of diplomatic missions, what would mean the continuation of the friendship treaty between the USA and Iran from 1980. Contrary, the American appeal court established that according to the ICJ decision, the treaty was still in force even during the crisis regarding the capture of the American diplomatic personnel. It is about a civil action attempted in the non-execution of a contract by an American society against Iran. With the attempted action, Iran demanded the suspension of the Judicial Panel on Multidistrict Litigation, because "*as a consequence of the President's order stopping travels between the United States and Iran, the lawyer cannot obtain factual information necessary to formulate a proper defense*". The request has been denied on grounds that the president's order had been issued as a result of the hostage taking in the American embassy and the illegal behavior of the Iranian state was already established by the ICJ decision

ICJ condemned Iran which "*was fully aware of its obligations … had the necessary means to fulfill its obligations; (but) failed in fulfilling these obligations*."

The trail was a result of the civil action introduced against the measures taken by INS (Immigration and Naturalization Service) at the order of the district attorney. Thus, it had been shown that the order was adopted at the illegal informing of the USA embassy in Iran and as a consequence of the hostage taking of the diplomatic personnel and it imposed Iranian students that went to school in the USA to come to the INS offices in order to offer data regarding their residence and their status as non-emigrants. The students that refused to offer this or offered false data risked of being expatriated. The Columbia District Court called to pronounce on the annulment of this act decided that the "*not allowed distinction made in the basis of national origin that violates the guarantee of equal protection of law according to the Fifth Amendment*" is illegal. The Appeal Court, opposite to this, has reformed the decision in the first case by showing that, in the immigration sector, the Congress and the executive may make differentiation based on nationality, if these are not totally unreasonable. Thus, in order to establish if the act is valid, it is necessary to produce with a prejudicial title, the proof of Iran's illegal behavior. In particular, to prove the legality of the governing act it was necessary to prove the illegal character of Iran's behavior regarding the United State. On this matter, the Appeal Court considered that the power to judge, by recognizing the efficiency of the ICJ decision with a collateral effect "*collateral estoppel*" by which this was already observed that the illegal action was realized by the Iranian state.

In this context, the implementing of the CS decisions may raise a true "constitutional crisis" in a national plan, mainly in the human rights and fundamental liberties domain. Among the international courts, only the European Court of Justice and the European Court of Human Rights issue decisions with a direct effect in the judicial order of member states, the first on the basis of its regulations and the second, through the treaty that offers a quasi-constitutional rang to its decisions for all the member state of the European Council.

3. Conclusions

In conclusion, it results that international law will efficiency the application of positive law being at least, an instrument of interpretation and, on the other side national law represents the exclusive manner of transpose of international regulations in a national plan. Thus, regardless if these are seen as two different judicial orders or as different parts of the same universal order international law and domestic law contribute to the realization of a common purpose and at the same time to their primordial function: maintaining peace and social cohesion.

For this reason we consider it wrong to talk about the exclusion or compromise between the two different judicial orders – national and international, but we may speak instead about the reciprocal enrichment and normative reinforcement between the two different spaces of legality.

The last tendency in the matter of interpreting the rapport between national and international law is represented by the abandon of the systemic point of view in favor of the substantial matter one. The latter opts for the omnipresence of international law in internal law. This new tendency is a consequence of globalization that imposes the idea that international law must evolve from the protecting of bilateral interests towards the protecting of international community interests as a whole and the promoting of international politics under the shape of developing certain universal principles as human rights and fundamental liberties, supposing that the implementation of international law in internal law is inevitable and state don't have many options in this case. Thus, regardless if these are seen as two different judicial or as different parts of the same universal order, international law and domestic law contribute to the realization of a common purpose and at the same time to their primordial function: maintaining peace and social cohesion.

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*** http://www.icj-cij.org/homepage/index.php?lang=fr.